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00-451

No. _____

Supreme Court, U.S.
FILED
OCT 23 2000
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BAYLOR UNIVERSITY,

Petitioner,

v.

VERNON G. JOHNSON,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Vernon G. Johnson ("Johnson"), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Baylor University ("Baylor"), seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on June 22, 2000.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

Johnson filed suit in state district court on January 19, 1999, claiming that Baylor had tortiously interfered with his employment relationship with Kitty Hawk Air Cargo, Inc. ("Kitty Hawk"). Baylor removed the case to federal court on February 18, 1999, asserting that federal question jurisdiction existed based on the Pilot Records Sharing Act ("PRSA"), 49 U.S.C. § 44936. Johnson promptly filed a Motion to Remand on March 2, 1999, contending that 49 U.S.C. § 44936 merely provided a defense that would limit Baylor's liability in Johnson's state court case if Baylor had complied with the statute when Kitty Hawk requested that Baylor furnish Johnson's employment records. Baylor also filed a Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim asserting that Johnson's pleadings did not allege that Baylor had knowingly furnished false information in violation of a criminal statute of the United States as provided in 49 U.S.C. § 44936 (g)(3). At Johnson's request, the Court held in abeyance the Motion to Dismiss pending ruling on the Motion to Remand.

On May 3, 1999, the U.S. District Court issued its order and opinion denying Johnson's Motion to Remand. Because the Court's Order denying Remand affirmed Baylor's contention that Johnson had no cause of action against Baylor except a cause of action as described in 49 U.S.C. § 44936 (g)(3), Johnson did not respond to Baylor's Motion to Dismiss and on July 7, 1999, the District Court dismissed Johnson's case.[1]

Johnson filed his Notice of Appeal. The case was fully briefed and was orally argued before the Fifth Circuit, which rendered its Opinion and Judgment on June 22, 2000, reversing the judgment of the District Court and remanding the case to the District Court with instruction to remand the case to state court. Baylor filed no Petition for Review or for En Banc Hearing.

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[1] In Baylor's Statement of the Case, Baylor attempts to cast aspersions on Plaintiff's counsel for requesting additional time to respond to Baylor's Motion to Dismiss and then not responding and not "offer[ing] any excuse" for not responding. Although Baylor's statements are totally irrelevant to the issues in its Petition, Plaintiff's counsel would show that the record in this case reflects that Plaintiff's counsel was involved in pre-trial and trial in another case against Baylor beginning on May 3, 1999 and continuing until the jury returned its verdict against Baylor on June 11, 1999. Thus, Plaintiff's counsel did not have an opportunity to review the Court's May 3rd Order and consult with Johnson until after June 11, 1999; whereupon Johnson decided to rely on the Order denying Remand as the basis for his appeal.

Statement of Material Facts[2]

Johnson was employed as Baylor's Chief Pilot beginning on January 1, 1992. His employment was terminated on August 26, 1995. The primary reason for the termination was unrelated to his skill as a pilot. Instead, the termination was expressly related to Johnson's chronic obesity, which Baylor stated "diminished his professionalism" and thus "diminished the image" of the University and made it impossible for Johnson to represent the university as it should be represented.

Johnson filed suit against Baylor, contending that Baylor discriminated against him on the basis of his chronic obese condition which Baylor perceived to be a disability. Although Baylor admitted that the termination of Johnson's employment was related to his obesity, Baylor contested Johnson's claim of discrimination, contending that his obesity did not qualify as a disability under the law because it did not prevent him from obtaining employment in a job class or with other employers.

In the course of proceedings, Dr. Herbert Reynolds, who had been Johnson's supervisor and who had made the decision to terminate Johnson's employment, admitted that Johnson was an excellent pilot and contended that Johnson could work as a pilot in positions that did not require him to interact with the public, e.g. as a pilot for an air freight

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[2] As acknowledged by Baylor, the material facts in this case are the facts as stated in Johnson's "well-pleaded" complaint. Thus, Johnson's "Statement of Facts" includes the material facts as they are stated in the actual complaint, rather than as restated by Baylor.

company, but that his appearance prevented him from continuing to be employed as Baylor's chief pilot because that position required him to interact with potential donors and VIPs and Johnson's appearance was not consistent with the image that Baylor was striving to represent to such persons.

Ultimately, Johnson's disability suit was dismissed based on the Court's ruling that Johnson's obesity did not qualify as a disability protected by laws prohibiting discrimination because Johnson's physical condition was not perceived to be sufficiently disabling to prevent him from obtaining employment with other employers and/or in other positions (e.g. air freight).[3]

In August of 1997, Johnson obtained employment with Kitty Hawk Air Cargo, Inc. and Kitty Hawk began training Johnson for the position immediately thereafter. In the pre-employment interview, Johnson advised Kitty Hawk that he had been discharged from his employment at Baylor because of his overweight physical condition. Kitty Hawk required verification of Johnson's employment history, including verification of the reason(s) for Johnson's discharge from Baylor. The investigation of Johnson's employment history was begun during the time that Johnson was in training.

After Johnson completed the first phase of Kitty Hawk's training, he was entitled to a period of leave before

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[3] The District Court dismissed the case on February 12, 1997. Johnson appealed to the Fifth Circuit and on September 18, 1997. The Fifth Circuit affirmed the decision of the District Court.

resuming his training/employment. He was told that he was to return to work on or about September 26, 1997. The day before Johnson was scheduled to return to Kitty Hawk, he received notice that he was being removed from the training schedule and employment at Kitty Hawk.

In about March of 1998, Johnson discovered that his termination by Kitty Hawk was related to information furnished (and not furnished) by Baylor during Kitty Hawk's pre-employment background check. Specifically, Baylor told Kitty Hawk that Johnson had been discharged for "misconduct" and was "ineligible for rehire." When Kitty Hawk requested more specific information from Baylor, in an effort to confirm or contradict Johnson's statement that he was discharged because of his overweight condition, Baylor stated that no more specific information was available because Johnson's employment records were not readily available.

Johnson's original complaint in state court stated that "Baylor's representations to Kitty Hawk were false, and Baylor knew or should have known that the representations were false, and were made with reckless disregard for Johnson's rights. At the time that Baylor represented that Johnson's employment records were not available, Johnson's lawsuit against Baylor was still actively being pursued through the appeal process and Johnson's complete personnel file was easily accessible from court records in the Waco Division of the United States District Court of the Western District of Texas. These records were also in the possession of and accessible to Baylor's attorneys specially retained and in-house."

REASONS FOR DENYING THE WRIT

Petitioner asserts two reasons why this Court should grant a writ of certiorari in this case. First, Petitioner claims there is a split in the Circuit Courts of Appeals concerning complete pre-emption. Second, Petitioner claims that this case raises important recurring questions of federal law that are unresolved and that should be resolved by this Court.

In fact, this case does not conflict with other Court of Appeals' cases cited by Petitioner. More importantly,, this case does not present any significant issue that has not previously been resolved by this Court. Neither this case separately, nor when reviewed with the other Courts of Appeals' cases, justifies the granting of the writ of certiorari requested by Petitioner.

Following a discussion of the responses to Petitioner's arguments, Johnson will demonstrate that the Fifth Circuit's decision is correct regardless of the Fifth Circuit's three-part test and the facts and law applicable in this case would render review of this case pointless.

First Ground - No Conflict in the Circuits

Petitioner contends that this Court should grant a writ of certiorari to review this case because of a claimed conflict in the decision of the Circuit Courts of Appeals. Petitioner bases its contention (1) on an erroneous assertion that the Fifth Circuit has adopted a test for establishing complete pre-emption that is more stringent than tests adopted by other circuits and (2) on an erroneous assertion that this case directly conflicts with a decision of the First Circuit finding complete pre-emption in a case involving federal regulations

relating to pilot certification (i.e., "airman certificate") that, inter alia, required air carrier pilots to submit to drug testing, citing *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989).

The three-part test, stated by the Fifth Circuit in this case, is merely a restatement of the principles used by this Court in its analysis of ERISA pre-emption under *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). In *Metropolitan Life,* this Court began with the general rule that federal pre-emption is ordinarily a federal defense to a plaintiff's suit, which does not appear on the face of a well-pleaded complaint and, therefore, does not authorize removal to federal court. (*Id.* At 63) The Court then set about to determine whether or not the allegations in the plaintiff's claim(s) were "completely pre-empted" by federal law, applying the following principles:

> (1) In order for federal pre-emption to apply to convert a state law claim into a federal question for jurisdictional purposes, the federal law must include civil claim(s) that protect and displace the analogous *area* of state law. (*Id.*, at 63-64) In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), a companion case decided on the same day as *Metropolitan Life*, this Court noted that, in ERISA, Congress affirmatively set out to:
>
> > "protect...participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for

> fiduciaries of employee benefit plans, and by **providing for appropriate remedies, sanctions,** and ready access to the Federal courts. § 2 as set forth in 29 U.S.C. § 1001(b)"
> (*Pilot Life*, at 44, emphasis added)
>
> . . .
>
> "The policy choices reflected **in the inclusion of certain remedies and the exclusion of others** under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain state remedies under state law that Congress rejected in ERISA."
> (*Id.* at 54; also in *Metropolitan Life* at 64-65.)

In *Metropolitan Life* (at 64-65), this Court also noted that the "area" of the law pre-empted by Federal law may be very limited, noting the distinction between the "state tax collection suit" that the Court had decided was not pre-empted by ERISA in *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1 (1983)*, versus the "employee benefit plan" issues that were completely pre-empted in *Metropolitan Life* and *Pilot Life Ins. Co.*[4]

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[4] This Court subsequently noted the distinction between disputes involving alleged "violations of contracts between an employer and a labor organization" pre-empted by the LMRA according to *Avco Corp. v. Machinists, 390 U.S. 557 (1968)* versus individual employment contracts that are alleged to have arisen "independent of a labor contract" that were not pre-empted by the LMRA in *Caterpillar Inc. v. Williams, 482 U.S. 386, 394-395 (1987)*.

(2) In order for federal pre-emption to apply to convert a state law claim into a federal question for jurisdictional purposes, the federal law must make a specific jurisdictional grant to the federal courts for enforcement of the right. Specifically, this Court stated:

> "In the absence of explicit direction from Congress, this question would be a close one....Even with a provision such as § 502(a)(1)(B) that lies at the heart of a statute with the unique pre-emptive force of ERISA...we would be reluctant to find that extraordinary pre-emptive power, such as has been found with respect to § 301 of the LMRA, that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. But the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA. Section 502(f) says:
>
> > **'The district courts of the United States shall have jurisdiction**, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action. 29 U.S.C. § 1132(f)"

(*Metropolitan Life*, at 64-65, emphasis added.)

(3) There must be a clear Congressional intent that claims brought under the federal law be removable. Again, this Court noted that the Conference Report on ERISA, describing the civil enforcement provisions of § 502(a) said:

> "[W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State courts are to be regarded as **arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.**"
> (*Metropolitan Life*, at 65-66, emphasis added)

Thus, the Fifth Circuit's test is not overly exacting and is totally consistent with Supreme Court precedent cited above.[5]

Circuit Courts, other than the Fifth Circuit, have not necessarily expressly adopted the explicit language of the tripartite test that was applied in *Heimann v. National Elevator Indus. Pension Fund, 187 F.3d 493 (5th Cir. 1999)*

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[5] Respondent also argues that this case was correctly decided under Supreme Court precedent, regardless of the tripartite test applied by the Fifth Circuit. See discussion below in Respondent's Third Ground for Denying the Petitioner's Writ.

and in this case. However, they have generally[6] recognized and applied the same principles that were applied by this Court in *Metropolitan Life Insurance Co. v. Taylor*, and in *Caterpillar, Inc. v. Williams*, as described above.

Specifically, the following cases, cited by Petitioner as justification for the granting of the Writ sought by Petitioner, were actually correctly decided under existing Supreme Court precedent: (1) *Schmeling v. Nordam, 97 F.3d 1336 (10th Cir. 1996)* -- holding that complete pre-emption did not apply because Congress did not expressly or impliedly provide Plaintiff Schmeling with a federal cause of action to enforce FAA drug-testing laws, and noting that the ruling did not affect the Defendant's pre-emption defense (at 1344-, 1345); (2) *Strong v. Telectronics Paging Systems, Inc., 78 F.3d 256 (6th Cir. 1996)* -- holding that administrative remedies provided by federal law (i.e., MDA amendment to Federal Food, Drug, and Cosmetic Act, § 521(a), as amended, 21 U.S.C.A. § 360k(a)) were insufficient to "evince the clear manifestation of congressional intent necessary to create removal jurisdiction" and pre-emption, if any, was defensive issue (at 260-261); (3) *Rains v. Criterion Systems, Inc., 80 F.3d 339 (9th Cir. 1996)* -- holding that, although the facts relied on by Plaintiff Rains could have been the basis for a Title VII claim, Rains' "well-pleaded complaint" relied solely on state causes of action and Title VII does not pre-empt state laws that are not in conflict with it (at 344-345); (4) *Goepol v. National Postal Mail Handlers Union, 36 F.3d 306, (3rd Cir. 1994)* -- contrasting ERISA provisions with FEHBA (5 U.S.C. § 8901 et seq.) and holding that FEHBA, unlike

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[6] The decision of the First Circuit in *French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989)* will be addressed in detail below.

ERISA, did not contain a civil enforcement provision authorizing beneficiaries to bring actions to recover benefits under government employee's benefit plan; and that OPM regulations expressly provided that litigation on the claim should be brought against the carrier, but the regulations did not confer federal jurisdiction over such claims; and that, absent evidence of Congressional intent to the contrary, removal jurisdiction did not exist and pre-emption, if any, was a purely defensive issue (at 312-313; 315-317); and (5) *Rosciszewski v. Arete Associates, Inc., 1 F.3d 225 (4th Cir. 1993)* -- holding that complete pre-emption applied to Plaintiff's claims relating to state law rights, using the well-pleaded complaint rule because the state rights asserted were "equivalent to ... the exclusive rights within the general scope of copyright as specified [in the federal Copyright Act]" and were "governed exclusively by [the Act] 17 U.S.C.A. § 301(a)" and Congressional intent to completely pre-empt such claims was further evidenced by 28 U.S.C.A. § 1338(a) which provides that "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to ...copyrights...Such jurisdiction shall be exclusive of the courts of the states in ...copyright cases" (at 229, 231-232)[7].

In *Peters v. Union Pacific Railroad Company, 80 F.3d 257 (1st Cir. 1996)*, another case cited by Petitioner in

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[7] The *Rosciszewski* case also involved the issue of res judicata similar to the issue addressed by this Court in *Federated Department Stores, Inc. V. Moitie, 452 U.S. 394 (1981)* because Plaintiff brought the action as the assignee of a company that had previously asserted a federal copyright claim against the same Defendant and the federal case had been adjudicated by a consent decree entered after the parties settled the claim.

support of its requested Writ, the court reached the right result and cited appropriate applicable law, but did not necessarily address all of the issues raised in the existing Supreme Court precedent relating to complete pre-emption. The court found that the Federal Railroad Safety Act (FRSA) authorized the Department of Transportation to promulgate comprehensive regulations providing for licensing of any operator of a locomotive, and insuring that only qualified individuals would operate trains. The Court also found that the FRSA contained an express pre-emption clause that limited state laws or regulations that conflicted with regulations, rules, or orders adopted by the Secretary of Transportation, citing 45 U.S.C.S. § 434. Although, the regulations adopted by the Secretary included administrative remedies for those persons claiming to be aggrieved by the licensing/certification regulations, the court noted that Plaintiff Peters did not utilize the administrative remedies afforded by the FRSA. The court held that the pre-emption clause of the FLRA evidenced a clear and manifest purpose of Congress to pre-empt an area of state law; however, the court did not address the issue of whether or not Congress evidenced an intent to create a federal claim or to confer federal jurisdiction over the claim asserted by the Plaintiff, i.e. complete pre-emption as opposed to defensive pre-emption. Instead, the court simply concluded that the FRSA "expressly preempts state law on engineer certification disputes and because Peters failed to exhaust available administrative remedies, we affirm the district court's dismissal. Plaintiff Peters apparently chose not to pursue a Petition for Writ of Certiorari and the shortcomings of the *Peters* decision do not justify the granting of Petitioner's writ in this case.

Finally, Petitioner argues that the decision of the Fifth Circuit in this case is in direct conflict with the decision of the First Circuit in *French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989)*. Petitioner's argument is fatally flawed.

The *French* case is procedurally very distinguishable from the instant case, because the jurisdiction of the federal court in *French* was not raised on appeal. Instead the question presented for review was whether or not the district court properly "granted defendant's motion for judgment on the pleadings." (at 1) Because there was no issue relating to federal jurisdiction (aka "complete pre-emption") before the Court, the Court's opinion made no reference to *Metropolitan Life Insurance Co. v. Taylor*, nor did the opinion refer to *Caterpillar, Inc. v. Williams*. From the language of the opinion and the case law cited therein, it is clear that the Court was addressing the issue of ordinary pre-emption which was a defense to the Plaintiff's state law claim. The opinion is consistent with a later statement of this Court in *Cipollone v. Liggett Group, Inc., 505 U.S. 504, (1992)*, wherein the Court addressed the scope of defensive pre-emption under Article VI of the Constitution and under the Federal statutes applicable in that case.

Because the issues addressed in *French* were completely different from the jurisdictional issue presented in this case, the *French* case does not in any way justify the granting of Petitioner's Petition for Writ of Certiorari.

Second Ground - No Unresolved Questions of Federal Law Will Be Resolved by Granting a Writ in This Case

As noted above, this Court has thoroughly analyzed the doctrine of complete pre-emption in *Avco*, *Metropolitan Life Insurance*, *Franchise Tax Board*, and *Caterpillar*, cited previously.

In an effort to raise some unresolved issue that might justify the granting of a Writ in this case, Petitioner points to Footnote No. 4 in *Caterpillar, Inc. v. Williams*, cited supra, at 394, and argues that the first element of the Fifth Circuit test retains vestiges of a Ninth Circuit test that was rejected by this Court in FN 4 of *Caterpillar*. However, Petitioner has not and cannot explain how Footnote 4 would change the analysis or result of this case. Instead, Petitioner argues abstractly that confusion exists because of the explicit language of the Fifth Circuit's test and the inference in Footnote 4. In so doing, Petitioner ignores the fact that neither FN 4 nor the Fifth Circuit test says that a federal cause of action must provide the same relief as the state law that is pre-empted by the federal cause or causes of action on which federal jurisdiction is based. Instead, this Court and the Fifth Circuit have held that there must be one or more federal claims--not merely defense(s)--in order to invoke federal jurisdiction. (See also *Schmeling v. Nordam*, cited supra, at 1343, which draws the same conclusion with respect to the distinction between a cause of action and the relief afforded by the cause of action.)

Third Ground -- This Case was Correctly Decided

The express language of 49 U.S.C. § 44936 confirms that the statute merely provides a defense to Johnson's action in state court, and Baylor may rely on the defense in state court if Baylor can show that it complied with the terms and conditions of the statute.

The express language of Sec. (g), entitled "Limitation on liability; preemption of State law", makes the limitation on liability from state claims contingent on compliance with the terms and conditions of the statute--i.e. "Furnishing records when requested" and "using records in accordance with subsection (f)" of the Act which requires a person who is requested to furnish records to notify the applicant and to furnish to the applicant a copy of the records that are furnished to the prospective employer. Baylor must prove that it complied with all of the conditions precedent to limited liability in order to claim the statute as a pre-emptive defense to state law claims. This is pure and simple ordinary pre-emption and nothing more.

Baylor has furnished additional evidence supporting Respondent's contention that the statute merely provides a pre-emptive defense in its Petition for Writ of Certiorari on p. 17, where Baylor includes a quote from the Committee Report accompanying the Senate Bill enacted as 49 U.S.C. § 44936. The Report uses the term "immunity" to describe the limitation of liability under the PRSA. "Immunity" is a defense, not an offense. The Report further states that the immunity provisions would "prevent lawsuits" (i.e. act as a bar to suits) with respect to the furnishing or using of records against the prospective employing air carrier, as well

as the past or current employer, **"who comply with these provisions"**, i.e., who have fully complied with the conditions precedent to the existence of the immunity.

There is no language in the statute and no language in the report that expressly states or impliedly suggests that any cause of action or claim is created by the Act, nor is there any language that expressly or impliedly confers jurisdiction on federal courts for adjudicating such claims, if any. Finally, there is no language expressly stating or impliedly suggesting that a claim, if any, shall be a claim "arising under federal law", so as to convert a state claim into a federal claim for purposes of removal jurisdiction.

CONCLUSION

Petitioner has failed to provide any compelling reasons for this Court to grant a Writ of Certiorari. There is no split among the circuits. Rather, in this case and in other cases cited by Petitioner, the Courts of Appeals and this Court have applied the same rules of law to the different facts presented in each case. Each court then reached a proper decision based on those facts. Further, this case has not been used by the Court of Appeals to state a new and important position on an important or unsettled question of the law. Instead, this is a case only of significance to the parties.

Petitioner contends that the Fifth Circuit Court of Appeals used an overly exacting test and therefore reached an incorrect result in this case, despite the fact that the Court could have reached the same result using a less exacting test. Under such circumstances a review by this

Court is not favored. Further, Respondent strongly believes that the Fifth Circuit Court of Appeals was correct in its decision. This case does not merit further review by this Court.

For all of the foregoing reasons, Respondent requests that Petitioner's petition be denied.

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